Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

79-1398

RUSSELL E. LERMAN, Petitioner

v.

CITY COUNCIL and MUNICIPAL OFFICERS of the CITY of PORTLAND, MAINE, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

RUSSELL E. LERMAN
Attorney Pro Se
P.O. Box 451
Dover, N.J. 07801

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

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v.

CITY COUNCIL and MUNICIPAL OFFICERS of the CITY of PORTLAND, MAINE, Respondent

PETITION FOR A WRIT OF CERTORARI TO THE SUPREME JUDICIAL COURT OF MAINE

Petitioner requests that a writ of certiorari be issued to review the decision and opinion of the Supreme Judicial Court of Maine entered on October 17, 1979.

OPINION BELOW

The opinion of the Supreme Judicial Court is reported in 406 A.2d 903.

JURISDICTION

The decision of the Supreme Judicial Court of Maine was made and entered on October 17, 1979. An order denying a Petition for a Rehearing was made and entered on November 21, 1979. This Court's jurisdiction is invoked under 28 U.S.C.§1257(3).

QUESTIONS PRESENTED

A demolition order was issued to confiscate the Petitioner's real property by the City of Portland, Maine under state statute 17 M.R.S.A. 1751 et seq.

A provision in the said statute allowed an "appeal" to be taken to either the Superior or Supreme Judicial Court who "shall affirm, annul or alter such order." The power to remand, an appellate court's prerogative, was deleted. The pleadings of the "appeal" to the Superior Court included a complaint served upon the defendants and their response by order of the Court. An original court action not an appeal to a law court, was therefore instituted. Pre-trial memorandums of law filed by both parties contained lists of witnesses. A pre-trial conference, absented by the Petitioner because of a back injury of which the court was duly informed by telephone and personal messenger, reported that the Petitioner would not be allowed a de novo hearing, that the factual findings of the City Council were binding and ordered the record of the City Council actions concerning the said real property be transmitted to the Court by the Petitioner. An immediate controversy resulted. The Petitioner contended that his constitutional rights of due process had been infringed. The Petitioner unsuccessfully opposed

the order. After a motion to vacate the order was denied the matter was removed to Federal District Court. During this interim the Respondent filed a motion in state court to dismiss the case grounded on Rule 16(d) of the Maine Rules of Civil Procedure. After the case was remanded the Petitioner motioned to have the pre-trial controversy reported to the Supreme Judicial Court under Rule 72. Also the Petitioner filed an objection to the dismissal motion being contrary to 28 U.S.C. § 1446(e), which says that all state court proceedings are stayed after a matter has been removed to the jurisdiction of the federal court regardless of its removability.

The aforesaid Petitioner's motions were denied at the same hearing in which the Respondent's dismissal motion was granted. Later a Petitioner's motion for relief from the dismissal order clearly grounded on the violation of constitutional rights, was denied by the court.

The opinion from the court below, dated October 17, 1979, did not comment on the said pre-trial controversy which had consumed the entire matter; the merits of the pleadings were never reached. The questions presented are:

Whether a state court can arbitrarily by the issuance of bench rulings, being in conflict with the court's published rules of procedure, also abridge a litigant's constitutional rights of due process, or can procedural bench rulings take precedence over published rules restrictions and abridge a litigant's rights to due process under the Fourteenth Ammendment to the Federal Constitution.

Whether a state court can sustain a motion that is violative of 28 U.S.C. § 1446(e).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The due process clause to the Fourteenth Ammendment to the Unites States Constitution and section 1446(e) of Title 28 in the United States Code.

STATEMENT

This suit arose under title 17, Maine Revised Statutes Annotated sections 2851 to 2853. This statute refers to Dangerous Buildings which is under the general classification of Nuisance. Because the statute pertains to confiscation of real property the due process clause in the Federal Constitution's Fourteenth Ammendment is of vital interest.

The following factual account in chronological order of the proceedings in the lower courts specifies the stages in the said proceedings in which the Petitioner unsuccessfully attempted to have the lower courts pass upon the federal question of due process of law, and also the statutory requirement of 28 U.S.C. § 1446(e), the manner in which the Petitioner sought it to be reviewed and the way it was passed upon.

On the 30th of August, 1976 a demolition order was issued by the City of Portland to destroy the Petitioner's brick structure. The Petitioner timely filed a complaint in the Cumberland County Superior Court pursuant to 17 M.R.S.A. § 1752. The complaint alleged constitutional violations, statutory violations, confiscation of property with a categorical denial of all the factual claims asserted by the City in a demolition order consisting of a standard format whose blanks were filled under the city clerk with dates, names, etc. The City failed to issue a notice pertaining to the pertinent session of the City Council from which the demolition order emanated. There was a previous session in which, prior to a fire which struck the said building, a representative of the owners was present. An agreement was reached with the City in which the representative

would undertake some maintenance work on a small portion of brick work under the eaves of the roof overlooking the property's rear yard, away from foot and car traffic. There were dire warnings if the job was not performed promptly. Almost immediately after that session the said fire purposely set by juveniles struck the brick building.

The action to set aside the said demolition order was prosecuted in the Superior Court, the statute gave the property owner a clear choice of litigating it in a trial or law court. Therefore the action was commenced as an original court action. A complaint was issued by the Petitioner, an answer was ordered by the court and was received from the Respondents. Pre-trial Memorandums were submitted by both litigants, each party listing several witnesses, pointedly indicating a de novo hearing. Subsequently a pre-trial conference was held, the Petitioner had suffered a back injury precluding his attendance. This fact was relayed to the court by telephone and by messenger. The pre-trial conference was nevertheless held. A pre-trial order summarily relegated an original court action to a Writ of Certiorari review, negating the contemplated de novo hearing. The record of the City's action to demolish the said structure was ordered

to be transmitted by the Petitioner. Within the 20 day limit to transmit the record, the Petitionmoved to vacate the pre-trial order that denied the Petitioner his rights of due process. After this motion was denied the Petitioner, seeking another forum to protect his constitutional rights removed the case to federal court. Then the Respondent motioned to dismiss the action under Rule 16(d) in the state court. This dismissal motion violated 28 U.S.C. § 1446(e) which stays all state court proceedings which are null and void after the jurisdiction of the federal court has been invoked. After the case was remanded, the Petitioner, filed an interlocutory appeal under Rule 72, M.R.C.P. to the Law Court. The trial court justice had to certify the appeal motion. This Rule 72 motion was denied along with another motion that objected to the Respondent's dismissal motion as it violated the said federal statute. Concurrently the Respondent's dismissal motion was granted by the same justice who issued the contested pretrial order. Subsequently another motion by the Petitioner was made for relief of the dismissal order, grounded on the unconstitutionality of the pre-trial order, which was clearly delineated on the face of the motion, this motion

was also denied. The Petitioner then appealed the case to the court below. The opinion of this tribunal avoided the constitutional and statutory contentions as set forth in the Petitioner's briefs. The opinion thus upheld the trial court's right to supersede statutory and constitutional rights under the guise of procedural requirements.

REASON FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interpreted the due process requirements of the Federal Constitution to be secondary to a local court bench ruling, which the Petitioner contended was thereby null and void.

The said local ruling is directly related to the due process requirements of the State and Federal Constitutions. The ruling was issued at a pre-trial conference denying the Petitioner a de novo hearing of a matter concerning confiscation of property, and relegated a cause from an original court action to a Writ of Certiorari review, which required that the record of the inferior tribunal be transmitted to the reviewing court.

The Petitioner, through authorized court procedures, resisted the ruling until the cause was dismissed under the guise of procedural requirements, without considering the pre-trial order's constitutional implications.

The record in this matter was compiled by the City of Portland in the process of confiscating the Petitioner's real property by demolition. The entire process is guarded by the due process clause in the Fourteenth Ammendment, United States Constitution. The City Council's action was a judicial rather than non-judicial function. The reviewing court can order a de novo hearing because a court is accustomed to rendering decisions pertaining to nuisances. This is illustrated in Caron v. Margolin, 128 Me. 339, Sterling v. Littlefield, 97 Me. 478 and also Hutton v. City of Camden, 39 N.J.L. 122. A de novo hearing would require that the reviewing court make its own independent determination of the facts and the law. In Cooley's "A Treatise on the Constitutional Limitations", 8th ed. Chap. XVI, page 1325.."The local declaration that a nuisance exists is therefore not conclusive and the party concerned may contest the fact in the courts". The said pre-trial order opposed this principle. In Pittsburgh S.S. Co, v. Brown, 171 F.2d, page 178,.."that in enforcement of constitutional rights the federal court should determine such an issue upon its own record and the facts elicited before it." The said

pre-trial order ruled the record compiled by an administrative body acting in a judicial function should be transmitted to the reviewing court, this violated the principle set forth in Pittsburgh S.S. Co. v. Brown.

In their opinion below the court isolated a non-federal question, failing to associate it with the constitutional right of due process. The history behind the applicable state statute 17 M.R.S.A. §1751, et seq., under which the said City Council acted to destroy the Petitioner's real property, specifically shows that the state legislature intended that a de novo hearing be giving in the courts, even after the matter had been duly heard by the municipal body. The Laws of Maine shows that this intent has not been altered to this day. The intent to provide for a de novo hearing is succinctly stated in the Acts and Resolves of 1860, Chap. 177, " An Act Abating Nuisances"which specifically delineates the procedure to be followed in the state court. This statute is practically a duplicate of the applicable statute in Massachusetts and is in concert with many of the other states. Today's statute which had been truncated is more clearly delineated in the State Constitution, Art.1 § 20 "Trial by Jury". In Swett v. Sprague, 55 Me. 190, it was held that Chap. 177 of the public laws of 1860 is

constitutional.

In Brinkerhoff-Faris Co. v. Hill, 28 US 673, 74 L.Ed. 1107, which also concerns a deprivation of property case, it says "A violation of the due process clause may be accomplished by the state judiciary in the course of construing an otherwise valied state statute" In the matter of Crossman v. Galveston, a much quoted case which had been referenced in Ruling Case Law on the subject at hand, this case is found in 26 A.L.R. 1216, the Texas Supreme Court ruling in this matter which concerned the demolition of a wooded building, stated that the City of Galveston did not have the authority to declare a building a nuisance unless it was so in fact, if it did it would subject citizen's property solely to executive authority, putting it beyond the protection of the courts. This Texas case quotes Judge Cooley in Constitutional Limitation, P. 742, note, "Whether any particular thing or act is or is not permitted by the law of the state must always be a judicial question, and therefore the question of what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to local legislative or administrative boards" "In Wood on Nuisances, §744, this is announced with respect to conferring such final authority

on municipalities,-being equally applicable where the agency for the exercise of the authority is an administrative officer: 'It would, indeed be a dangerous power to repose in municipal corporations to permit them to declare, by ordinance or otherwise, anything a nuisance which the caprice or interests of those having control of its government might see fit to outlaw, without being responsible for all its consequences, and even if such power is expressly given by the legislature it is utterly inoperative and void, unless the thing is in fact a nuisance, ... Therefore, except in cases of great public emergency, ...it is the better course to secure an adjudication from the courts before proceeding tc abate it.'

"Under the contest made by his pleading, before the property of the defendant could be summarily destroyed, he was entitled to a judicial hearing and decision as to whether it ought to be destroyed. As applied to such a case, nothing less would amount to due process of law, without which the Bill of Rights declares no citizen shall be deprived of his property."

As was stated in Edwards v. Nash, 303 S.W. 2d 211..."The 'due process of law' clause of the Fourteenth Ammendment to the federal constitution whose principles are applicable alike in all states and do not depend upon or vary with local legislation".

Therefore in the instant deprivation of property matter, the state judiciary misconstrued an otherwise valid state statute by denying the Petitioner a de novo hearing, which resulted in a violation of due process. As stated in Sager v. Freight System, Inc. 68 F.R.D. 691, "A judgment in violation of the concepts of due process of law is void".

The Petitioner opposed the the pre-trial order on constitutional grounds, relying on the State and Federal Constitutions as interpreted in relative case law. Although the court below did not comment on the federal issues, the Petitioner maintains that the trial court abused its discretion on a non-federal basis. The Petitioner asserted in his complaint that he repudiated the factual contentions of the City Council as spelled out in a"boiler plate" demolition order and showed the court that he was ready to contest the facts, fully contemplating a full and fair hearing. In a treatise on "Use of Pre-trial" by the Honorable Charles E. Clark, 29 F.R.D. 456, it says:

"The proper function of the pre-trial is not to club the parties-or one of them- into submission. Rather the function is to see that the parties and the court are fully acquainted with the case, leaving no room for the tactic of surprise attack or defense, and to uncover and record the points

of agreement between the parties... there is here no basis forcing the parties to replead or restate their legal proposition in terms more limited than the suit formed by the pleadings. Pre-trial, in purpose and in its most successful use, is informational and factual, rather than legal and coercive. It may lead to settlement as the parties come to know their case better, but that must remain an uncoerced by-product."

The Petitioner asserts that the federal question cannot be isolated and set aside because it is interwoven into the Rule 16, pre-trial order, and it was necessarily involved in the disposition of the case by the state court, though it never appeared in the opinion of the court below.

In a case having similarities to the instant matter, NAACP v. Alabama, 357 U.S. 449, when the NAACP refused to obey a court order to produce a list of their members, claiming infringement of their constitutional rights, the state court found them in contempt, after which the NAACP moved to vacate the contempt judgement or stay its execution pending appellate review. This motion was denied, the state supreme court denied a Writ of Certiorari predicated on non-federal procedural grounds. The U.S. Supreme Court granted certiorari because of the importance of the constitutional question presented.

The Petitioner contends that the non-federal procedural grounds isolated by the court below does not independently and adequately support the judgement of the Superior Court. In Kaukana Water Power Co. v. Green Bay & M Canal Co., 142 U.S. 254, a matter that involved deprivation of property without due process, it was stated the Supreme Court will review such a question because it is not necessary that the federal question should appear affirmatively in the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court. The Petitioner claims that the federal question is interwoven with the non-federal ground, in the matter of Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, "where the non-federal question is so interwoven with the federal ground as not to be independant, or standing alone, is not of sufficient breadth to sustain the judgement, the jurisdiction of this court attaches."

Section 1446(e), Title 28 of the United States Code provides that state court proceedings are stayed after duly removing the case to the Federal system. "When an action is instituted in state court is removed to federal court, such removal renders null and void any action thereafter in state court in such action". Gremillon v. NAACP

90 S.2d 889. After the instant matter had been removed to federal court the Respondent filed in state court a motion under Rule 16(d), M.R.C.P. to dismiss the Petitioner's cause on the grounds that the Petitioner failed to obey the court's pre-trial order to transmit a record of the City of Portland's actions to destroy the Petitioner's real property. The same motion was granted by the state court after the matter had been remanded from the federal court. It says in Hopson v. North American Insurance Co., 223 P.2d 779... "A case is removed from the jurisdiction of state court for all purposes upon the compliance with the procedural steps for removal set forth in statute (28 U.S.C. § 1446) regardless of removability, and any action taken in state court before case is remanded will have no force or effect."

In an analogous matter to the case at bar, Edenton v. Hervey Foundation, 71 F. Supp. 995, it was held that the defendant could not file an answer in state court after removal to federal court since there was no suit then pending in state court.

The state court's dismissal order, grounded on a motion that was violative of 28 U.S.C. § 1446(e), was null and void. The Petitioner requested that the motion be stricken but was denied.

This conflict with the said federal statute was also brought forth in the Petitioner's Reply Brief submitted at the time of the Appellate action in the Supreme Judicial Court, but again it was passed over, it was ignored in the below court's opinion

The Petitioner feels that the state court's action is an erosion of the federal court system's jurisdiction. This conflict in itself justifies the grant of certorari to review the judgement below.

CONCLUSION

For the reasons set forth above, it is respectively submitted that this petition for a Writ of Certiorari should be granted.

Russell E. Lerman

Russell E. Lerman, Pro Se
P.O. Box 451
Dover, New Jersey 07801

RUSSELL E. LERMAN

v.

INHABITANTS OF THE CITY

OF PORTLAND

Supreme Judicial Court of Maine

Oct. 17, 1979

Before POMEROY, WERNICK, ARCHIBALD, GODFREY and NICHOLS, JJ

ARCHIBALD, Justice.

Acting pursuant to M.R.S.A. § 2851,[1] the defendant ordered the demolition of a certain building in Portland of which the plaintiff was a part owner. This order prompted the plaintiff to file the complaint and summons authorized by Rule 80B, M.R. Civ.P., thus in effect appealing the action of the defendant governmental agency to the Superior Court. The Superior Court ordered the action dismissed, from which order the plaintiff appealed.

We deny the appeal.

17 M.R.S.A. § 2852 provides:

> Any person aggrieved by such order may, within 30 days after said order is made and recorded, file an appeal therefrom to any Justice of the Supreme Judicial or Superior Court who shall, after notice and hearing, affirm, annul or alter such order and may render such judgment as to cost as justice requires.(emphasis supplied)

On the docket of the Superior Court the case became a civil action focusing on the validity of the demolition order issued by the defendant. The case thus became subject to the Maine Rules of Civil Procedure, including Rule 16, containing provisions that a pre-trial order may issue after a pre-trial conference. Rule 16(c)(4), M.R. Civ.P. An analysis of the docket indicates that such a conference was scheduled and held on January 31, 1978, at which time the plaintiff, who appeared pro se following withdrawal of his attorney, was not present although notice thereof had been previosly given to him. That the plaintiff was seasonably notified is evident by his personally signed motion asking for a continuance of the pre-trial conference, which was denied because "not timely filed". As a part of the pre-trial order that issued, the plaintiff was "ordered to produce record on appeal within 20 days." (emphasis supplied). On May 30, 1978, a Superior Court Justice, acting on the defendant's motion for sanctions against the plaintiff for failure to comply with the pre-trial order, denied the motion for sanctions but ordered the plaintiff to comply with the order within thirty days, adding this handwritten caveat: "In the event the pre-trial not complied w/the complaint is dismissed."

The plaintiff then made an abortive effort to remove the case to the United States District Court Court, which ordered the case restored to the docket of the Superior Court. On December 22, 1978, once again acting on defendant's motion to dismiss for failure to comply with a pre-trial order, a justice of the Superior Court ordered the complaint dismissed. It is this order which generates the instant appeal.

One of the issues isolated in the pre-trial order was the "propriety of the order of Mun. Officers of City of Portland." Therefore, the record made at the hearing held by the Portland City Council would have been critical to have before the Superior Court in order that it might determine whether it should "affirm, annul or alter" the demolition order. The rather adamant refusal of the plaintiff to furnish this information has not been justified. As we have noted, Mr. Lerman was ordered to obtain this information on January 31, 1978, but it was not until December 31, 1978, that the sanctions were imposed, even though his default had been in existence since February 20th.

Rule 16(d), M.R.Civ.P., authorizes the court, in the event of a failure to comply with the mandate of a pre-trial order, to "impose upon the party or his attorney or both such penalties and

sanctions as the circumstances warrant, which may include the dismissal of the action....."It is basic that the Law Court may reverse such a decision only if the presiding justice has abused the discretion vested in him under this rule. We note the commentary in Field, McKusick and Wroth, Maine Civil Practice, that Rule 16(d) "recognizes the inherent power of the court to enforce the provisions of the rule aimed at making pre-trial procedure effective," and also that "the court has wide discretion to take other measures as appropriate." Field, McKusick and Wroth, supra, commentary 16.6.

We can detect no abuse of judicial discretion in ordering the dismissal of an action under Rule 16(d), M.R.Civ.P., where the plaintiff has refused to comply with the pre-trial order, particularly when he has had approximately ten months in which to comply. See Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734(1962). We are fully supported in reaching this conclusion by our holding in the recent case of Sheepscot Land Corp. v. Gregory, Me., 383 A.2d 16, 22-23 (1978), where the plaintiff had failed to appear for trial on a date previously set at a pre-trial conference. In Sheepscot the defendant had filed a counterclaim and, on failure of the plaintiff to appear on the pre-assigned trial date, the court

ordered a default judgment in favor of the defendanton the counterclaim. We concluded that the impositionof that sanction was appropriate under the authority of Rule 16(d).[2] We see no essential difference between the facts before us and those underlying the decision in Sheepscot. See 3 Moore's Federal Practice.¶ 16.6 at 1134. See also Wirtz v. Hooper-Holmes Bureau v. J.C. Penney Co., D.C., 26 F.R.D. 209(1960).

The entry is: Appeal denied.

Order dismissing complaint affirmed.

McKusick, C.J., and Glassman, J., did not sit.

1. Whenever the municipal officers shall find a building or structure or any portions thereof or any wharf, pier, pilings or any portion thereof which is or was located on or extending from land within the boundaries of the municipality, as measured from low water mark, is structurally unsafe; unstable; unsanitary; constitutes a fire hazard is unsuitable or improper for the use or occupancy to which it is put; constitutes a hazard to health or safety because of inadequate maintenance, dilapidation, obsolescence or abandonment or is otherwise dangerous to life or property, they may after notice and hearing on this matter, adjudge the same to be a nuisance or dangerous and may make and record an order prescribing what disposal shall be made thereof.

17 M.R.S.A. § 2851.

2. In addition to "dismissal of the action or any part thereof with or without prejudice." the sanctions authorized by Rule 16(d) also include "the default of a party, the exclusion of evidence at the trial, and the imposition of costs including attorney's fees and travel."

STATE OF MAINE
CUMBERLAND, ss

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. Cum-79-24

RUSSELL E. LERMAN)
v.)
INHABITANTS OF THE)
CITY OF PORTLAND)

ORDER

Upon motion of appellant for stay of issuance of mandate or for stay of execution and upon petition of sppellant for rehearing,

It is ORDERED that the appellant's petition for rehearing be and hereby is DENIED, and that the motion for stay be DISMISSED.

Dated this twenty-first day of November, 1979.

For the Court,

Charles A. Pomeroy
Justice

STATE OF MAINE

SUPERIOR COURT
Civil Action
Docket No. 76-1069

Cumberland, SS.

Lerman
Plaintiff
v.
Inhabitants of the City of Portland
Defendant

REPORT OF PRE-TRIAL CONFERENCE AND ORDER

Pursuant to Rule 16(c), M.R.C.P., a pre-trial conference was held in this cause this day, with all parties represented by counsel. It appearing that the pre-trial memoranda contain an accurate statement of the issues joined herein, and that the pre-trial memoranda are adequate to govern the conduct of the trial, IT IS ORDERED that.

1. Pursuant to Rule 40(a), M.R.C.P., the Clerk transfer this cause to the *non-jury* Trial List. Counsel anticipate that the time required may be *1 day*.

2. Counsel meet in advance of trial(a) to mark all exhibits to be offered in presenting their respective cades in chief; (b) to endeavor to stipulate as to the authenticity of those exhibits, while reserving until trial other objections to the admissibility thereof; and(c) to further explore possible settlement of this

cause.

3. Except as may be inconsistent with the express provisions of this Order, the pre-trial memoranda filed by counsel, be adopted, and incorporated by reference herein, to govern the trial of this cause. *Pending motions of Plaintiff should be disposed of by Plaintiff as rapidly as possible so as not to delay trial-probably should be brought before Presiding Justice who determined against motions on which pending motions rest.*

Plaintiff, pro-se, not present. Stephen Johnson, Esq. appeared specially requesting reconsideration of denial of Motion to Continue filed by Plaintiff and previously acted on-

Plaintiff ordered to produce record on appeal within 20 days pursuant to Rule 80B requirements

Issues before court-

**(1) Propriety of the Order of Mun. Officers of City of Portland to demolish*

**(2) Was Plaintiff accorded procedural due process*

Dated: *Jan. 31, 1978.*

SL Perkins

Justice, Superior Court

*The within action is not a de novo hearing on whether or not a building in which the Plaintiff has an interest should be ordered demolished but whether or not the legal requirements were met- when order was entered and were due process requirements met.

STATE OF MAINE

ACTS AND RESOLVES, 1860

ABATING NUISANCES

Chapter 177

An act abating nuisances.

Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows:

SECT. 1. Whenever the mayor and alderman of any city, or the selectman of any town, after due notice in writing to the owner of any burnt, dilapidated or dangerous building, and after a hearing of the matter, shall adjudge the same to be a nuisance to the neighborhood, or danferous, they may make and record an order, prescribing what disposition or alteration shall be made thereof, or such provisions as they shall deem necessary, and thereupon it shall be the duty of the city or town clerk to deliver a copy of such order to a constable, who shall serve such owner with an attested copy thereof, and make return of his doings thereon to said clerk forthwith. If no application shall be made to the supreme judicial court, or a justice thereof, as is hereinafter provided, the mayor and alderman of such city, or selectman of such town, shall cause said nuisance to be abated, removed or altered in compliance with their order, and all expenses thereof shall be repaid to the city or town by such owner;

if not paid within thirty days after demand, they may be recovered of such person by an action for money paid for his use.

SECT. 2. Any owner aggrieved by any order passed under the provisions of the first section of this act, may apply to the supreme judicial court, if in session in the county in which such order is passed, or to any justice thereof, in vacation for a jury, and such court or justice shall forth with order a warrant for a jury to issue, to be empanneled by the sheriff in the same manner as is provided by section ten of the eighteenth chapter of the revised statutes in regard to the laying out of highways. Such application shall be made within five days after such order is served on such owner, and the jury shall be empanneled within seven days from the issuing of the warrant.

SECT. 3. The jury may find a verdict, either affirming or annulling the said order, or making alterations therein, as they may see fit, which verdict shall be returned forthwith to the justice issuing the warrant for acceptance. He may accept or reject the same, and may, if rejected, order a new warrant, if he thinks reasonable. If the court is not in session the action shall be entered on the docket of the court for the preceding term, exceptions taken by either party shall be allowed as of that term, execution

may issue as of that term, and if the verdict is finally accepted, the justice may issue all proper process for enforcing the same.

SECT. 4. If the verdict shall affirm such order, costs shall be recovered by the city or town against such applicant. If the verdict shall annul such order in whole, costs shall be recovered by the applicant against such city or town, and in case such verdict shall alter such order in part, the court may render such judgment as to costs as to justice shall pertain.

SECT. 5. This act shall not be in force in any town or city, unless the inhabitants of the town, or the city council of the city shall adopt the same at a legal meeting of said inhabitants, or city council called for that purpose.

[Approved March 19, 1860]